No. 123.

DEC 5 1898
JAMES H. McKENNEY,
Clerk.

Term No. 123 Gen. No. 1660

Brf. of Ahrens for D. E.

IN THE

Filed Dec. 5, 1898.

Supreme Court of the United States

OCTOBER Term, A. D. 1898.

JOHN A. LOMAX,
Plaintiff in Error.

vs.

AQUILA H. PICKERING,
Defendant in Error.

Error to
Supreme Court
of Illinois.

Brief and Argument for Defendant in Error.

JOHN P. AHRENS,
Attorney for Defendant in Error.

A. B. CASE PRINTING AND PUBLISHING CO., 170 Madison Street, CHICAGO

—IN THE—

Supreme Court of The United States,

OCTOBER Term, A. D. 1898.

JOHN A. LOMAX, *Plaintiff in Error.*	)	Error to
vs.		Supreme Court
AQUILA H. PICKERING, *Defendant in Error.*	)	of Illinois.

Brief and Argument for Defendant in Error.

STATEMENT OF CASE.

MAY IT PLEASE THE COURT:

This was an action of ejectment brought by the defendant in error in the Superior Court of Cook County against plaintiff in error for certain lands in Cook county, which resulted in a judgment in favor of defendant in error for the possession of the property described in the declaration in fee simple, and the plaintiff in error appealed to the Supreme Court of Illinois where the judgment of said Superior Court was affirmed, and the plaintiff in error brings the case to this court by writ of error.

This is the second time the case comes before this Court. When it was here before the judgment was

against the present defendant in error, entered by the Superior Court upon the evidence of the plaintiff below alone, without any evidence being offered on behalf of the defendant below. The judgment of the Superior Court was affirmed by the Supreme Court of Illinois (*Pickering* v. *Lomax*, 120 Ill., 291); but upon a writ of error from the United States Supreme Court, the judgment of the Supreme Court of Illinois was reversed, and the case was remanded to the Superior Court for another trial. *Pickering* v. *Lomax*, 145 U. S., 313.

Upon the second trial in the Superior Court, the plaintiff below offered precisely the same evidence offered by him on the first trial (excepting evidence of tax titles, of which there is none in the present record, and which was not considered by the United States Supreme Court), so that the evidence of the title of defendant in error now before this Court is precisely the same as it was before, and which, the United States Supreme Court held, established a good title in Pickering, the defendant in error.

Upon the second trial in the Superior Court, the defendant below also offered evidence, but the Court held that the defendant's evidence was insufficient to overcome the title of defendant in error, and entered judgment this time in favor of Pickering, the defendant in error as above stated.

The title of defendant in error came through Joseph Robinson, an Indian, and the evidence of it is concisely stated in the opinion of the United States Supreme Court, as follows:

> "In order to establish his title, the plaintiff offered inevidence, Article 4, of the treaty of Prairie du Chien, which so far as the same is material, reads, as follows: 'There shall be granted by the United States to each of the following persons (being descendants

from Indians), the following tracts of land, viz.: To Claude Laframboise, one section of land on the Riviere aux Pleins, adjoining the line of the purchase of 1816; * * * to Alexander Robinson, for himself and children, two sections on the Riviere aux Pleins, above and adjoining the tract herein granted to Claude Laframboise. * * * The tracts of land herein stipulated to be granted, shall never be leased or conveyed by the grantees, or their heirs to any persons whatever, without the permission of the president of the United States.'

"Plaintiff then offered in evidence a copy of the patent issued December 28, 1843, signed by President Tyler, under the provisions of the above treaty, granting the lands, including those in litigation, to Alexander Robinson, for himself and children. The patent also contained the provision: 'But never to be leased or conveyed by him or them, his or their heirs, to any person whatever, without the permission of the president of the United States.' The next instrument in plaintiff's chain of title was a decree in a suit in partition instituted February 22, 1847, in the Cook County Court of Common Pleas, between Alexander Robinson and his children, and evidence to show that the lands in question were set out to Joseph Robinson, one of the children. The following deeds were then put in evidence: Deed, dated August 4, 1858, from Joseph Robinson and wife to John F. Horton, which had indorsed upon it the approval of the president of the United States, which approval was dated January 21, 1871. Deed from Leon Straus, administrator, etc., of the estate of John F. Horton, deceased, to Moses W. Baer, dated October 6, 1863, and made in pursuance of an order of sale by the County Court of Cook County for payment of debts. Several intermediate conveyances of the premises, down to a deed dated November 10, 1866, from Henry H. Dyer and wife to Aquila H. Pickering, the plaintiff."

The above mentioned deed from Joseph Robinson and wife to said Horton was, before its approval by the presi-

dent, recorded in the recorder's office of Cook County, on July 18, 1861, (Rec., 23), and again recorded in said recorder's office, with the approval of the President indorsed thereon on March 12, 1873, (Rec., 27-28.) Plaintiff in error Lomax claims title through a second deed from said Joseph Robinson and wife to one Alexander U. McClure, dated November 22, 1870, conveying the land in question with about 89 acres more of adjoining land (more than twelve years subsequent to the date of the Horton deed), which second deed was approved by the President on February 24, 1871, one month and three days subsequent to the approval of the Horton deed by the president. (Rec., 84-85.)

That the President was misled in approving the McClure deed, is quite apparent from the memoranda attached to that deed. By examining this memoranda (Rec., 80-81), it will be found to consist of an affidavit of one Robert A. Kinzie, sworn to January 26, 1871,— five days after the approval by the President of the Horton deed—stating, in substance, that the McClure deed had been submitted to him, and that he was informed by said Joseph Robinson, and verily believed, that $6,441 were to be paid to said Robinson by said McClure in money; and that affiant believed there could be no injustice or injury done to said grantor in consequence of said conveyance of said land, etc.

Also a plat of the two sections of said Robinson's Reservation, showing the parts set off to the Robinsons respectively, by the partition proceedings above mentioned, and showing a part of that portion set off to said Joseph Robinson to be shaded or colored red. The land in question is included within the colored or shaded part; the parts left unshaded are shown to have been conveyed to

different parties at different times. Under this plat there is the following statement:

> "Diagram of 'Robinson's Reservation' in Cook County, Illinois. The names written in red ink are those to the decree of partition of said tracts in the Cook County Court, May 29, 1848, it being divided among them in five equal portions. The shaded part of Joseph Robinson's portion is intended to be conveyed by the accompanying deed. *Those parts of his portion not shaded have been conveyed by him in other deeds, as noted on this diagram.*
>
> I have examined these statements and maps throughout, and know them to be all correct."
>
> (Signed) JOSEPH ROBINSON.

As already stated, the land in question is included in the shaded part of the diagram, and in the McClure deed, and although this land had been conveyed to Horton more than twelve years before, nothing is said about that conveyance in this specious statement, but by stating that the parts *not shaded had been conveyed*, the natural implication would be that the parts that *were shaded* and intended to be conveyed by the McClure Deed, *had not been previously conveyed*, In other words, by this statement it was very adroitly and deceitfully made to appear to the president that the *shaded part* had not been previously conveyed, notwithstanding the fact that that portion of the shaded part constituting the land in question had been conveyed by said Robinson to Horton more than twelve years before this, and the deed of which had then been approved by the President.

McClure was engineering the scheme, and when he commenced negotiating for the second deed from Robinson, he knew that Robinson had made a prior conveyance of the land. (Rec., 98.) From the foregoing it will be observed that the McClure deed, under which plaintiff in error claims, was executed over twelve years subsequent to the date of the Horton deed, and over nine

years after the Horton deed was recorded in the recorder's office of Cook County; the McClure deed was obtained with full knowledge of and notice to McClure of the prior deed to Horton; the approval of the McClure deed by the president was obtained more than a month after the approval of the Horton deed; and the approval of the McClure deed, it is submitted, was obtained by deceit, or to say the least, by a suppression of the fact of the Horton deed and the approval thereof, by which the president was led to believe, when he approved the McClure deed, that there had been no previous conveyance of that part contained in the McClure deed which was conveyed by the Horton deed.

It is not difficult to see how the president was thus misled. The description of the land in the Horton deed being a long and tedious description by metes and bounds, and the description in the McClure deed being also a long description by metes and bounds, and being different from the description in the Horton deed—because the McClure deed contained about three times as much land as that contained in the Horton deed—it is not at all surprising that the president overlooked the fact that the description in the McClure deed included the land conveyed by the Horton deed.

It is true that the McClure deed, with the approval of the President indorsed thereon, was recorded in the recorder's office of Cook County, before the Horton deed was *re-recorded* with the approval of the president indorsed thereon; and the contention of plaintiff in error is that by reason thereof, and because, as he claims, the partition proceedings were not approved by the President, the title of plaintiff in error is superior to that of defendant in error, while the defendant in error contends that under the former decision of this Court, his title is superior to that of the plaintiff in error.

BRIEF.

I.

The point made by counsel for plaintiff in error that no legal title could be acquired by the defendant in error which came through the proceedings in partition in the Court of Cook County, was passed upon by this Court when the case was here before in favor of defendant in error, and is now *res adjudicata*.

Pickering v. *Lomax*, 145 U. S., 310.

II.

Plaintiff in error and his grantors do not come within the exceptions referred to in the opinion of this Court as to intervening rights of third persons. The subsequent approval by the President of the McClure deed was without legal authority and did not affect the former approval of the Horton deed.

Ex Dem., *Godfrey* v. *Beardsley*, 2 McLean, 412.

Lomax v. *Pickering*, 165 Ill., 431.

Pickering v. *Lomax*, 145 U. S., 310.

III.

It was not necessary to record the President's approval of the Horton deed in the recorder's office of said Cook County at all, and the prior recording of the subsequent approval of the McClure deed did not give it priority over the Horton deed.

Ex Dem. Godfrey v. *Beardsley*, 2 McLean, 412.

United States v. *Schurz*, 102 U. S., 378.

Bicknell v. *Comstock*, 113 U. S., 149.

Gilmore v. *Sapp*, 100 Ill., 297.

Bruner v. *Manlove*, 1 Scam., 156.

20 Am. Eng. Ency. of Law, page 530, and authorities cited.

Rhinehart v. *Schuyler*, 2 Gil., 473.

Grave v. *Bruen*, 1 Gil., 167.

Lomax v. *Pickering*, 165 Ill., 431.

IV.

The question as to whether or not it was necessary, under the recording acts of Illinois to record the approval by the President of the Horton deed, in the recorder's office of Cook County, is not a federal question; and the highest Court of Illinois having decided, in *Lomax* v. *Pickering*, 165 Ill., 431. that it was not necessary to record it, this Court will follow the decision of the Supreme Court of Illinois on this question. In other words, this question involves the construction of a state law, and this Court has frequently decided, that the construction of a state law upon a question affecting the titles to real property in a state by its highest Court, is binding upon the Federal Courts.

Williams v. *Kirtland*, 13 Wal., 306.

Gormley v. *Clark*, 134 U. S., 338.

Bardon v. *Land & River Imp. Co.*, 157 U. S., 327.

Forsyth v. *Hammond*, 166 U. S., 506.

Argument and Brief.

I.

The point made by counsel for plaintiff in error on page 35 of their brief, that no legal title could be acquired by the defendant in error which came through the proceedings in partition in the Court of Cook County, and the deeds made thereunder, defendant in error contends was passed upon by the United States Supreme Court in favor of defendant in error and is now *res adjudicata*.

The United States Supreme Court, it will be remembered, in setting out the chain of title of defendant in error, said (page 311):

"The next instrument in plaintiff's chain of title was a decree in a suit in partition, instituted February 22, 1847, in the Cook County Court of Common Pleas, between Alexander Robinson and his children, and evidence to show that the lands in question were set out to Joseph Robinson, one of the children"; hence the partition proceedings were before this Court and were passed upon and considered sufficient to support the title of defendant in error.

Besides, when the Horton deed was before the President for approval there were attached to it the following documents, viz.:

1. A statement referring to the patent issued to Alexander Robinson, for himself and his children, pursuant to the fourth article of the treaty aforesaid.

2. A statement that on February 22, 1874, Joseph Robinson, a son of Alexander Robinson, filed his petition for partition of said lands, against said Alexander Robin-

son, and against David, Cynthia and Mary Robinson, the remaining children of Alexander Robinson, and by decree entered May 29, 1848, the Court set off and allowed to Joseph Robinson 256 acres, as shown on the following plat, which is attached to the commissioner's report of partition.

3. Then follows said plat showing that the lands in question, with other land, were set off to said Joseph Robinson in said partition proceeding.

4. A statement setting forth and describing said Horton deed, and the land therein described and conveyed.

5. A plat made by Alexander Walcott, county surveyor of Cook county, showing the boundaries of the land in question.

6. A certificate of Jones & Sellers, abstract makers, certifying that there were no conveyances by Joseph Robinson of the land in question recorded in the recorder's office of Cook county, except the Horton deed.

7. Affirmation of Aquila H. Pickering that he is the owner of the land in question, etc.

8. Affidavit of Fernando Jones that he has resided in Cook county since 1835; that he was well acquainted with the value of land throughout Cook county; that he had been shown a certified copy of the Horton deed, and that he believed the consideration named in the deed was all the land in question was worth at the date of the deed. (Rec., 24 to 27.)

Hence, when the Horton deed was before the president he was fully informed of all the matters set forth in the statements and affidavits attached to the deed. He was informed that there had been a partition proceeding whereby the land in question was set off to said Joseph Rob-

inson without the permission or approval of the president —that is, in the statement of those proceedings and the setting off of the land to Joseph Robinson in severalty, attached to the deed, it appears that the partition was without the president's approval; consequently, when President Grant approved the Horton deed, he knew that it was based upon the partition proceeding, and he also knew that the partition so made between Alexander Robinson and his children had never been approved by the president of the United States; therefore, the approval of the Horton deed was in legal effect also an approval of the partition proceedings and of all the acts done thereunder to effect the setting off of the lands in question to said Joseph Robinson.

II.

The position taken by counsel for plaintiff in error that plaintiff in error and his grantors come within the exceptions referred to in the opinion of the United States Supreme Court, as to intervening rights of third persons, is untenable.

The Horton deed had been approved by the president before McClure or Robinson made any effort to have the McClure deed approved, because the affidavit attached to that deed upon which its approval was obtained, was sworn to on a date subsequent to the date of the approval of the Horton deed. Clearly then, any supposed rights under the McClure deed can not be considered as the rights of a third person intervening "between the act and the ratification," within the decision of the United States Supreme Court.

The United States Supreme Court said (145 U. S., page 314):

"The treaty does not provide how or when the permission of the president shall be obtained, and there is certainly nothing which requires that it shall be given before the deed is delivered.

"*Doe* v *Beardsley*, 2 McLean, 412. It is doubtless, as was said by the Supreme Court of Mississippi, in *Harmon* v. *Partier*, 12 S. & M. 425, 427, 'a condition precedent to a *perfect title*' in the grantee; but the neglect in this case to obtain the approval of the president for thirteen years, only shows that for that length of time the *title was imperfect*, and that no action of ejectment would have lain *until the condition was performed*. * * *

"A delay of thirteen years is immaterial, provided, of course, that no third parties have in *the meantime legally acquired an interest* in the lands. If, after executing this deed, Robinson had given another to another person, with the permission of the president; a wholly different question would have arisen. But so far as Robinson and his grantees are concerned the approval of the president *related back to the execution of the deed and validated it from that time*. As was said by this Court in *Cook* v. *Tullis*, 18 Wall, 332-338: 'The ratification operates upon the act ratified precisely as though authority to do the act had been previously given, except where the rights of third parties have intervened *between the act and the ratification*.'"

Now it is clear that the approval of the McClure deed *after* the approval of the Horton deed, did not give plaintiff in error any right under the McClure deed which intervened "*between the act and the ratification*"—that is, which intervened between the *act* of the execution of the Horton deed by Robinson and the *ratification* thereof by the president.

Later in the opinion, the United States Supreme Court says (page 315):

"In *Murray* v. *Wooden*, 17 Wend., 531, a conveyance of land by an Indian, which, subsequent to

its date, had been ratified by a certificate of approbation of the surveyor-general in the form prescribed by law, was held to be inoperative upon the ground that, *previous to the granting of such certificate*, the Indian had conveyed to a third person, and the deed to such person had been approved in the mode prescribed by law, *previous to the endorsement of the certificate of approbation of the deed first executed.* This was a clear case of rights *intervening between the execution of the first deed and its approval.*"

This language, it is respectfully submitted, is a positive condemnation of the McClure deed, as effectually as if there had been an express decision by the Court that the McClure deed was subject to the Horton deed. It holds that the deed *first approved* by the proper authority carries the title, and that the approval takes effect immediately after the indorsement thereof, and relates back to the date of the deed. It shows that to have brought plaintiff in error within the exception as to intervening rights of third persons, mentioned in the opinion of this Court, it was necessary for him to show that the McClure deed was *approved before* the Horton deed was approved. Plaintiff in error, having failed to show this, but on the contrary it appearing affirmatively that the Horton deed was approved *over a month before the approval of the McClure deed*, the Horton deed certainly carried the title through *mesne* conveyances to defendant in error, and therefore no right, title or interest in the land passed through the McClure deed to the plaintiff in error.

This was the view taken by the Supreme Court of Illinois, in this case, *Lomax* v. *Pickering*, 165 Ill.. 431.

That Court, after setting out the respective claims of title of the plaintiff and defendant in error, said (pp. 434-435):

"This is the second time this case has been in this Court. On the first trial in the Superior Court the plaintiff in the action was defeated, and on appeal to this Court we affirmed the judgment. (*Pickering* v. *Lomax*, 120 Ill., 289.) We held under the provision in the treaty and in the patent prohibiting a sale of the premises without the permission of the President of the United States, that the deed made by Robinson without the approval of the President did not pass the title. A Federal question being involved, Pickering, the plaintiff removed the case to the Supreme Court of the United States, where the judgment of this Court was reversed and the cause remanded, the Court holding that the President having approved the deed from Robinson to Horton, thirteen years and six months after it was executed, validated the instrument. (*Pickering* v. *Lomax*, 145 U. S., 313.) Upon the second trial in the Superior Court the plaintiff offered the same evidence offered by him on the first trial, (excepting evidence of tax titles, of which there is none in the present record), so that the evidence of appellee's title now before the Court is precisely the same as it was before. The plaintiffs title resting in the deed from Joseph Robinson to John F. Horton, dated August 3, 1858, and approved by the president January 21, 1871, *having been sustained on the Federal question*, which was the vital question in the case, it now only remains to be determined whether the evidence introduced on the second trial by the defendant, which is now for the first time before the Court, was sufficient to defeat the title of the plaintiff.

"In the opinion of the Supreme Court of the United States it is said: 'If after executing this deed, Robinson had given another to another person, with the permission of the President, a wholly different question would have arisen. But so far as Robinson and his grantees are concerned, the approval of the President related back to the execution of the deed and validated it from that time. As was said by this Court in *Cook* v. *Tullis*, 18 Wall., 332 (338): The ratification operates upon the act ratified precisely as though

authority to do the act had been previously given, except where the rights of third parties have intervened between the act and the ratification. The retroactive efficacy of the ratification is subject to this qualification. The intervening rights of third persons, cannot be defeated by the ratification.' And it is said by appellant that his grantor, McClure, having obtained a deed from Robinson, November 22, 1870, before the deed from Robinson to Horton was approved by the President; he falls within the exception and is entitled to protection. If the McClure deed had been approved by the President before the President approved the deed made to Horton, the position of appellant might be regarded as well taken. But such was not the case. The deed made to McClure, appellant's grantor was not approved, and hence did not become a valid conveyance until February 24, 1871, while in the mean time, and on January 21, 1871, the President approved the Horton deed. Thus the Horton deed under the ruling of the Federal Court became and was a valid conveyance of the land almost a month before the McClure deed was approved and became effectual as a conveyance. Where, as here, two deeds were executed by the same grantor, the deed first approved by the President will carry the title."

Again in the case of *Doe, ex dem. Godfrey* v. *Beardsley*, 2 McLean, 412, which was cited with approval by this Court in *Pickering* v. *Lomax*, *supra*, it was held that where, in a treaty, the lands reserved and granted to individual Indians, cannot be conveyed without the permission of the President, that permission might be given in such form as the President should think proper; and that such permission having been given by the President, his successor could not revoke or annull it.

In that case the Court said (p. 419):

"The second objection that the sanction to the sale given by Mr. Adams, was informal and invalid,

cannot be sustained. Neither the treaty nor any law prescribed the form in which this sanction should be given. The treaty imposed the duty upon the President, and he could execute it in such form and manner as his discretion should dictate. Now where this power is so exercised, how can the form be objected to? Can the judiciary declare the act invalid because the form in which it was done is not exactly in the manner they should have prescribed? The Executive as an independent branch of the Government has the same right to adopt its own forms in the performance of its own duties as the judicial or legislative departments. The law-making power may prescribe the form in which judicial or executive duties shall be done; but where a duty is enjoined, and this is omitted, the discretion of the department as to the mode must be exercised.

"Except by the permission of the President, Pierre Moran could not convey this land. That permission was obtained before the deed was executed. Now whether it would have been more judicious to have withheld the sanction until the execution of the deed, is a matter about which differences of opinion may exist. But whether given before or after the deed, it is equally within the power of the President." * * *

"The last position that the permission given by Mr. Adams, was revoked and annulled by General Jackson, is wholly untenable. Whatever acts may be done under the pretense of reform by the chief Executive, unless such acts depend upon his discretion, and come within his executive duties, they are utterly null and void. They can vest no right nor afford any ground of justification; much less can they divest private interests—interests which have been acquired under the laws of the country. It is difficult to perceive under what pretense this power was attempted to be exercised by General Jackson. He had the same power as his predecessor and no greater. The executive function having been exercised on the subject, the power is exhausted. And this is especially the case where the interest of a third party is involved. Under no notion that the power had

been injudiciously exercised by Mr. Adams, or that Pierre Moran had not made a good bargain, or on any other pretext had Genaral Jackson any right to annull the permission granted. There is indeed one ground, and only one, on which this act might be placed; and that is that it had been inadvertently done without a knowledge of the act of his predecessor. But such a supposition cannot arise, as by the endorsement of General Jackson upon the deed of Beardsley, it seems he had a full knowledge not only of prior permission to convey, but that under it a conveyance had been executed. Indeed evidence of this remained on file in the general land office. This act of General Jackson cannot be placed upon a supposed fraud by Godfrey in obtaining a conveyance from Moran. If fraud existed, the courts were open to investigate it as between Moran and his grantee. It was not a matter which the executive could try. Besides fraud is not to be presumed. That it may be established by *exparte* evidence on inquiry by the Executive, and the rights of a party annulled without notice, would be a principle as new in the law of evidence as it would be singular as a rule of property."

Upon the principle laid down in this case, the subsequent approval by the President of the McClure deed, was absolutely null and void. The power of the President was exhausted when he approved the Horton deed. And, therefore, no claim of title can be set up under the McClure deed. The fact that Robinson told McClure that Horton had not paid for the land is immaterial. The same kind of evidence was offered in the case last cited, and was unavailing. The Court said (p. 415):

"The plaintiff then proved by several witnesses, and by the confession of the defendant, that at the time the deed was executed to him in the office of the Indian agent, and in his presence, Pierre Moran said that he had sold the land to Godfrey, but that he refused to pay him for it, and he would sell it again."

The Court holding, as already shown, that the act of General Jackson in revoking the permission given by a former President, and approving a subsequent deed, could not be placed upon a supposed fraud by Godfrey in obtaining a conveyance from Moran; that if fraud existed, the courts were open to investigate it, as between Moran and his grantee, but that it was not a matter which the executive could try. Hence, if a subsequent President did not have the power to revoke the approval of a deed made by a former President, when that revocation was made with a full knowledge of the former approval, certainly the subsequent approval by President Grant of the McClure deed after approving the Horton deed, and which approval of the McClure deed was evidently the result of an inadvertance, as already shown, the approval of the McClure deed was a mere nullity so far as the land in question is concerned, and the mere recording of such approval in the recorder's office of Cook County, certainly could not make the approval of the McClure deed of any force or effect.

III.

It was not necessary for defendant in error to record the approval of the Horton deed in the recorder's office of Cook County at all. The record of said approval in the department at Washington was, from the date of the approval, notice to all the world that the deed which had been executed by Robinson to Horton, and previously recorded in the recorder's office of Cook County, had been approved, and that such approval related back to the date of the deed.

After the approval of the Horton deed, the President had no power to approve the McClure deed, and the

approval of the McClure deed was absolutely void and of no effect. The recording laws of the State have no application to the question of title between the parties to this cause.

The original patent to the Indians, issued under the treaty in question, was offered in evidence in this case; and it appears therefrom that neither the patent nor the treaty has ever been recorded in the recorder's office of Cook county. So far as the record in Cook County showed, when McClure began negotiations for his deed, no approval of the Horton deed by the President was necessary, because there was nothing of record in the recorder's office showing that the approval of the President was necessary. The record of the Horton deed was constructive notice to the world, and McClure admitted himself, on cross-examination, that he knew that the Indians had made a former deed, at the time he was negotiating for a second deed, as already shown.

It is submitted that the act of the President in approving a deed under the Indian treaty in question, bears the same relation to those Indian lands, as the act of the President does under the acts of congress, to the public lands, in the issuing of patents of said public lands. Hence the same principles and rules of law applicable to the acts of the President and other officers, in relation to the issuing of patents, apply to the acts of the President in approving these Indian deeds.

The position of the defendant in error is, that the President, having approved the Horton deed, had no farther power or authority to approve any subsequent deed of the same land; and that therefore, the approval of the McClure deed as to the lands in question, was absolutely null and void, and did

not affect the rights of defendant in error in the least. By the approval of the Horton deed, as decided by the United States Supreme Court, the Indian title was wholly divested from Robinson, as of the date of the original Horton deed. And the subsequent approval by the President of the McClure deed, could not and did not re-invest the title in the Indian and pass it by the McClure deed.

It was not necessary even for the President to give his approval upon the deed itself, or upon any other paper that could be delivered to the party seeking the approval.

In the case of *Ex Dem. Godfrey* v. *Beardsley*, 2 McLean, 412, the permission was not indorsed upon the deed at all, but upon the petition praying for the permission. It certainly cannot be contended that in that case there was anything to record in the state recorder's office, showing the granting of the permission, because the petition upon which the permission was indorsed became a part of the records of the department at Washington. The approval by the President of the Horton deed passed the Indian title, *by matter of record*, and no delivery of any paper evidencing such approval to appellee was necessary to perfect his title; and consequently, it was not necessary to perfect his title; and consequently, it was not necessary for Mr. Pickering to file for record in the recorder's office of Cook county any document whatsoever, evidencing the approval of the Horton deed by the President.

The record of that approval in the department at Washington was notice to the world of the approval, without any record thereof being made in the recorder's office of Cook county.

It has frequently been decided that when two patents have been issued by the United States government, of the

same land, the elder patent prevails and the second patent is absolutely null and void. Upon the same principle, where there have been two approvals of an Indian deed by the president, of the same land, the elder approval must prevail, and the subsequent approval is absolutely null and void.

In support of these propositions, the attention of the court is respectfully called to the following authorities:

Doe Ex Dem. Godfrey v. *Beardsley*,, 2 McLean, 412, already hereinbefore cited and quoted from.

In *United States* v. *Schurz*, 102 U. S. 378, the court, by Justice Miller, said (p. 397):

> "We are of opinion that when, upon the decision of the proper office that the citizen has become entitled to a patent for a portion of the public lands, such a patent made out in that office is signed by the President, sealed with the seal of the general land office, countersigned by the recorder of the land office, and duly recorded in the book kept for that purpose, it becomes a solemn public act of the government of the United States, and *needs no further delivery or other authentication to make it perfect and valid.* In such cases the title of the land conveyed passes, *by matter of record, to* the grantee, and the *delivery which is required when a deed is made by a private individual, is not necessary to give effect to the granting clause of the instrument.*" * * *
>
> "The patent, in the meaning of the act referred to, is granted to the patentee from its date; *though he may never actually see or receive it*, and is valid and effectual to pass the title to the land." (Page 400.) * * *
>
> "From the very nature of the functions performed by these officers, and from the fact that a transfer of the title from the United States to another owner, follows their favorable action, it must result that at some stage or other of the proceedings their authority in the matter ceases.

"It is equally clear that this period is, at the latest, precisely when the last act in the series essential to the transfer of title has been performed. Whenever this takes place, the land ceased to be the land of the government; or to speak in technical language, the legal title has passed from the government, *and the power of these officers to deal with it has also passed away.* The fact that the evidence of this transfer of title remains in the possession of the land officers *cannot restore the title to the United States, or defeat that of the grantee*, any more than the burning up of a man's title deeds destroys his title." (Page 402.)

In *Bicknell* v. *Comstock*, 113 U. S. 149, the court, by Justice Miller, said (p. 151):

"One of the facts admitted in the case is this:

"It is admitted that on the first day of May, 1869, a patent in due form was executed by the president of the United States, conveying to said Bicknell said lots 3 and 4, which patent was duly recorded in the general land office on the same day at Washington, D. C., and thereupon the original was transmitted to the United States land office at Fort Dodge, Iowa, for said Bicknell.

"In June, 1878, the commissioner of the general land office ordered a return of this patent to his office, and thereupon tore off the seals and erased the president's name from said patent and mutilated the record thereof in the general land office, all without the consent and against the protest of the grantees of said Bicknell. That this action was utterly nugatory and left the patent of 1869 to Bicknell in as full force as if no such attempt to destroy or nullify it had been made, is a necessary inference from the principles established by the Court in the case of *United States* v. *Shurz*, 102 U. S., 378. That principle is that when the patent has been executed by the president and recorded in the general land office, all power of the executive department over it has ceased."

If, in that case, the affirmative intentional act of the officer to revoke the patent by tearing off the seal and erasing the President's name was void, for a much greater reason the apparently inadvertent and unintentional act of the President in approving the McClure deed was void, so far as it related to the land in the Horton deed, and it could not and did not, by implication, revoke the former approval of the Horton deed.

In *Gilmore* v. *Sapp*, 100 Ill., 297, the Court said (page 303):

> "The Supreme Court of the United States has held that when a patent is filled out, countersigned, sealed and recorded in the general land office, the title to the land rests in the person named in the patent, *without a formal delivery of* the instrument, and as this decision relates to a construction of an act of Congress, it is authoritative and binding on all other tribunals. See *United States ex rel* v. *Shurz*, 102 U. S., 379.
>
> "If, then, as held by that Court, the fee simple title vested in Swisher when the patent was recorded, we are aware of no means by which he could be involuntarily deprived of his title except by a judicial proceeding. That is the only means known to the law. The legislative power of the government is not competent to transfer title from one person to another, nor to the government. That is beyond its power. That branch of the government can only declare what acts of the owner may authorize the courts to declare that the title shall be transferred. Hence it follows that legislative authority is incompetent, if it would, to confer such power upon a mere ministerial officer, and any effort by such officer to cancel a patent which transfers title to a grantee, and reinvest the title in the government, is absolutely void, and can affect the rights of no one. Such an officer, under the division of the powers of our government, possesses no such authority, and can be invested with no such functions. The act, then, of the commissioner of the general land office,

"in setting aside and annulling the entry and patent was void, and did not produce the slightest effect on the title of Swisher."

In *Bruner* v. *Manlove*, 1 Scam., 156, the Court said (page 161):

"1st. What is the rule in reference to the conveyance by the government of the United States of its land, where there are two sales and conveyances of the same land to different persons and at different times? * * * On the first point we presume that a patent for land or *any mode of sale adopted by the government* for the disposition of the public domain, must be subject to the same rules of interpretation as ordinary cases. It will not, we apprehend, be for a moment contended to be otherwise. What, then, is the rule where two patents have issued for the same lands to different persons at different times? *The elder patent is the highest evidence of title*, and as long as it remains in force it is conclusive against a junior patent. *The second patent is inoperative and void, if the land passed by the first patent.*"

The act of the President in the approval of these Indian deeds standing upon the same footing as his act in the issuing of patents of the public lands, it follows that the registry laws of Illinois have no application whatever to the approval of these deeds by the president. In other words, such recording acts do not require the recording in the recorder's office of any evidence of such approval. And the recording of the McClure deed, approved as aforesaid, prior to the re-recording of the Horton deed, with the approval of the President thereon, is wholly immaterial in this case. It was not necessary for defendant in error to have recorded his copy, approved as aforesaid, at all. The approval of the Horton deed rests upon the same basis as a deed or

patent emanating directly from the United States; and it has been decided by the Supreme Court of Illinois and numerous other courts, that the registry laws of the several States do not apply to patents or deeds emanating directly from the United States.

In 20 Am. & Eng. Ency. of Law, page 530, the writer says:

> "Patents of land from the United States do not come within the purview of the recording laws of the different States when the terms employed do not specially include them. The original record in the general land office, from which patents are issued, has been held to give notice to the world of their existence." Citing,
>
> *Curtis* v. *Hunting*, 6 Iowa, 536.
> *David* v. *Rickabaugh*, 32 Iowa, 540.
> *Rhinehard* v. *Schuyler*, 7 Ill., 473.
> *Moran* v. *Palmer*, 13 Mich., 367.
> *Sands* v. *Davis*, 40 Mich., 14.
> *Evitts* v. *Roth*, 61 Tex., 81.
> *Stevens* v. *Geiser*, 71 Tex., 140.

In *Rhinehart* v. *Schuyler*. 2 Gil., 473, the Court said (p. 523):

> "In regard to the first objection, that the auditor's deed should not have been permitted to have been read to the jury, without preliminary proof of its execution, it is only necessary to say that our registry laws do not apply to patents or deeds emanating directly from the State or the United States."

In *Graves* v. *Bruen*, 1 Gil., 167, the Court said (p. 172):

> "It is hardly necessary to say that the registry acts do not apply to patents emanating from either the State or the United States. In case of loss of the

> original patent, a copy from the record would not be admissible as secondary evidence to supply its place, and would be of no effect for that purpose. It is necessary in such cases to obtain a duplicate patent from the authority which issued the first patent. The registry laws have no application whatever in such case."

That this case does not come within *Wilcox* v. *Jackson*, 13 Pet., 498, cited in the brief of plaintiff in error is shown by the opinion of the United States Supreme Court in this case, because, although the patent was issued in accordance with the Indian treaty, and although the Illinois Supreme Court, applying the laws of Illinois to the case, decided that appellee had no title, the United States Supreme Court applied the Federal laws to the case and reversed the judgment of the Supreme Court of Illinois.

The title to the land in question, which had once been the property of the United States, did not pass absolutely by the patent to Alexander Robinson and his children.

The United States still retained a control over the land, by providing in the patent that said Robinsons should not convey the lands without the permission of the President of the United States; and consequently, the effect of the approval of the deeds in question must be resolved by the laws of the United States. In other words, the title to the lands in question did not pass from the United States by the patent to the Robinsons in such a sense as to make the approval by the president of a deed, given by the Robinsons under the patent, subject to the recording laws of this State.

The cases cited in the brief of plaintiff in error as to void instruments, can have no bearing on this case against

the defendant in error, but on the contrary show that the recording of the McClure deed did not give it any force or effect, because the subsequent approval of it by the President was absolutely null and void, as above shown. The United States Supreme Court held that an imperfect title passed by the Horton deed, which became perfect as of the date of the deed upon the approval of the deed by the President. The Horton deed, therefore, even before its approval by the President was not a void instrument.

It was a deed, conveying, it is true, an imperfect title, but still conveying a title which would become perfect by the subsequent approval of the deed by the President of the United States. Therefore the recording of the Horton deed in 1861, in the recorder's office of Cook county was notice to all the world, that Joseph Robinson had done all that he could do to pass the title to Horton, and it was further notice to all the world that as soon as the record in Washington should show that the president had approved the deed, the imperfect title passed by the Horton deed would become perfect, as of the date of the Horton deed.

The place for persons seeking to procure a second deed from the Indian, to look for the purpose of ascertaining whether or not the first deed had been approved, was the record in Washington, and not the record of the recorder's office of the county where the land was situated.

The question of *laches*, suggested by counsel for plaintiff in error does not enter into this case, because, as already shown, defendant in error had obtained the President's approval of the Horton deed *before* McClure had taken any steps to procure the approval of the McClure deed.

IV.

It is respectfully submitted, that the contention of counsel for plaintiff in error, that there is nothing in this record to show when the approval by the President of the Horton deed became a matter of record in the department at Washington, can not be sustained. The fact, that the certificate of the officer certifying to the copy of the record bears a late date is immaterial. The copy of the record is properly certified to be a correct copy, and that shows upon its face that the Horton deed was approved by the President January 21, 1871, and it necessarily follows that that was the date of the record of such approval in the department at Washington.

The defendant in error offered in evidence a certified copy showing the Horton deed, the certificate of the recorder of Cook County certifying it to be a true copy of the record of a certain instrument filed in his office on the 18th day of July, 1861, and also showing as attached to the deed a certificate and plat of Jones & Sellers, an affidavit of Aquila H. Pickering, an affidavit of Fernando Jones, the submission thereof to the Secretary of the Interior, on January 6, 1871, the submission thereof to the President on January 21, and the approval thereof by the President on the 21st day of January, 1871. (Rec., 21-27.)

All of which is certified to, under the date of March 7, 1896, by the Commissioner of Indian affairs, that the same "is a true copy of the certified copy of the original deed as the same appears of record in this office." (Rec., 21-22.)

Now, counsel for plaintiff in error contend, that because the certificate of the Commissioner of Indian Affairs,

is dated March 7, 1896, there is no evidence in this record that there was any record in the department at Washington before that time of the approval by the President of the Horton deed. This is clearly a misapprehension, because when, on January 6, 1871, the certified copy was submitted to the Secretary of the Interior, that submission became a matter of record in the department on that day, and when on January 21, 1871, it was submitted to the President and approved by him, such approval became a matter of record on that day. The copy of the record shows on its face when the record was made, and the proper officer certifies to the correctness of the copy. The date of the officer's certificate merely shows when the copy was made, and so long as the copy is correct, it certainly is immaterial whether the copy was made on the same day that the record itself is made or afterwards. It was not for the officer to certify as to when the record was made. The record speaks for itself, and the officer certifies that the copy of the record made by him is correct.

If this were not so, there would be no way of establishing the date of any public record, because it certainly would not be competent to prove the date of a record by parol.

It is respectfully submitted that the only question in the present case which was not decided by this Court when the case was here before, is as to the application of the recording laws of Illinois to the approval by the President of the Horton and McClure deeds. In other words, whether or not, under said recording laws, the recording in the recorder's office of Cook County of the approval by the president of the McClure deed, prior to the recording of the approval by the president of the Horton deed

had the effect of making the title of plaintiff in error derived under the McClure deed, prior to the title of the defendant in error, derived under the Horton deed.

The Supreme Court of Illinois has decided that as respects the approval of the President required by the treaty and the provisions of the patent to render the deed effectual, the recording laws have no bearing upon it.

Lomax v. *Pickering*, 165 Ill., 431.

This question involves the construction of a state law, and this Court has frequently decided that the construction of a state law upon a question affecting the titles to real property in the state by its highest Court is binding upon the Federal Courts.

Williams v. *Kirtland*, 13 Wall., 306.

Gormley v. *Clark*, 134 U. S., 338.

Bardon v. *Land & River Imp. Co.*, 157 U. S., 327.

Forsyth v. *Hammond*, 166 U. S., 506.

In the last decision of this case by the Supreme Court of Illinois, *Lomax* v. *Pickering*, 165 Ill., 431, the Court said (435-437.):

> "But it is said, the McClure deed is entitled to priority under the recording laws of the State. Section 28 of our Statute, entitled 'conveyances' provides that 'deeds, mortgages, powers of attorney, and other instruments relating to or affecting the title to real estate in this State shall be recorded in the County in which such real estate is situated.' By section 30 of the same act it is provided: 'All deeds, mortgages and other instruments in writing which are authorized to be recorded, shall take effect and be in force from and after the time of filing the same for record and not before, as to all creditors and subsequent purchasers without notice; and all such deeds and title papers shall be

adjudged void as to all such creditors and subsequent purchasers without notice until the same shall be filed for record.' Here the McClure deed under which appellant claims, with the approval of the President endorsed thereon, was recorded in the recorder's office of Cook County, March 11, 1871, while the Horton deed, containing the approval of the President, was not recorded until March 12, 1873, and it is contended that the deed first recorded bearing the approval of the President will take priority over the other deed recorded at a later date.

As respects the approval of the President required by the treaty and the provisions in the patent to render the deed effectual, we do not think the recording laws have any bearing upon it. There was a record of the approval of the President in the department at Washington, and that record was notice to all concerned from the time it was made, and we do not think the recording laws of the state required a copy of that record to be recorded in the recorder's office where the land is located. A record of that character is similar to a patent issued by the President for lands that belong to the government, which is not required to be recorded in the county where the land is located. In the American and English Encyclopedia of Law (vol. 20, p. 530), the author says: 'Patents of land from the United States do not come within the purview of the recording laws of the different states when the terms employed do not specially include them. The original record in the general land office, from which patents are issued, has been held to give notice to the world of their existence' (citing Illinois decisions and decisions from other states.)

"It was not necessary that the approval of the President should be endorsed on the deed. The approval might have been endorsed on a petition presented to him for his approval, or he might have made a record of the application, with his approval, without endorsing it on any paper. The record made in the department would be the evidence of the fact."

Here then, the highest court of the State of Illinois, has decided, that the recording acts of Illinois have no application whatever to the approval by the President of the Horton deed. In other words, that it was not necessary to record the approval by the President of the Horton deed in the recorders's office of Cook County at all; and therefore the highest court of the State having thus placed a construction upon a State law affecting the title to land in the State, this court will follow the decision of the highest State court on that question, as will appear by a review of the cases above cited, namely:

In *Williams* v. *Kirkland*, 13 Wall 306 the validity of a tax deed was in question, under the provisions of a State statute and this court said (p. 311.)

> "This construction of a State law upon a question affecting the titles to real property in the State by its highest court, is binding upon the Federal Courts."

Gormley v. *Clark*, 134 U. S., 338, was a suit brought under the "Burnt Records Act" of Illinois, and the Court said (p. 348):

> "Upon the construction of the constitution and laws of a State, this Court, as a general rule, follows the decisions of her highest court, unless they conflict with or impair the efficacy of some provision of the Federal constitution, or of a Federal statute, or a rule of general commercial law. *Norton* v. *Shelby County*, 118 U. S., 425, 439, and this is so where a course of those decisions, whether founded on statutes or not, have become rules of property within the state; also in regard to rules of evidence in actions at law; and also in reference to the common law of the State, and its laws and customs of a local character when established by repeated decisions. *Burgess* v. *Seligman*, 107 U. S., 20; *Bucher* v. *Cheshire R. R. Co.*, 125 U. S., 555. Substantially conclusive effect is given to such decisions upon the construction of State statutes, as affecting title to

real estate within the State. *Ridings* v. *Johnson*, 128 U. S., 212; *Bacon* v. *North Western Ins. Co.*, 131 U. S., 258; *Hanrick* v. *Patrick*, 119 U. S., 156, 169."

In *Bardon* v. *Land and River Improvement Company*, 157 U. S., 327, one of the questions was as to the construction of the recording acts of Wisconsin, and this court held that it was bound by the construction placed thereon by the Supreme Court of Wisconsin.

This Court said (p. 338):

> "We entirely concur in the ruling of the Supreme Court of Wisconsin and *it is decisive of the question made.*"

In *Forsyth* v. *Hammond*, 166 U. S., 506, this Court said (pp. 518-519):

> "The construction by the Courts of a State of its constitution and statutes is, as a general rule, binding on the Federal Courts. We may think that the Supreme Court of a State has misconstrued its constitution or its statutes, but we are not at liberty to therefore set aside its judgments. That Court is the final arbiter as to such questions" (citing many authorities.)

Such being the case, and the decision of the Supreme Court of Illinois in this case being in entire conformity with the former decision of this Court, it is difficult for counsel for defendant in error to perceive that there is now any federal question involved in the case; but be that as it may, it is respectfully submitted that the decision of the Supreme Court of Illinois in favor of defendant in error is right and should be affirmed.

Respectfully submitted.

JOHN P. AHRENS,
Attorney for Defendant in Error.